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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 24-170

ANDREW B. CRICHTON, R. M. CRICHTON, C. N. CRICHTON, M. E. CRICHTON, R. B. CRICHTON, AND A. B. CRICHTON, JR., COPARTNERS DOING BUSINESS AS SUPER SERVICE MOTOR FREIGHT COMPANY; THE MASON AND DIXON LINES, INC.; HOOVER MOTOR EXPRESS COMPANY, INC.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants

JURISDICTIONAL STATEMENT BY THE PLAINTIFFS-APPELLANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

(Filed October 24, 1944)

The plaintiffs-appellants respectfully present the following statement setting forth the grounds upon which it is contended that the Supreme Court of the United States has

jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed:

1. Statutory provisions sustaining the jurisdiction are:

U. S. C. Title 28, Section 47a (Act of March 3, 1911, c. 231, Section 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C. Title 28, Section 41(28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C. Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938).

U. S. C. Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C. Title 28, Section 345(4) (Act of March 3, 1891, c. 517, Section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Section 35, 31 Stat. 85; April 30, 1900, c. 339, Section 86, 31 Stat. 158; March 3, 1909, c. 269, Section 1, 35 Stat. 838; March 3, 1911, c. 231, Section 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Section 2, 38 Stat. 804; February 13, 1925, c. 229, Section 1, 43 Stat. 938).

2. The decree sought to be reviewed was entered on August 24, 1944, and the application of plaintiff for appeal was presented on October 23, 1944 together with an assignment of errors.

3. The nature of the case and of the rulings of the court which bring this case within the jurisdictional provisions relied on and a statement of the grounds upon which it is contended that the questions involved are substantial are as follows:

This is an appeal from a decree of the District Court of the United States for the Southern District of New York

entered August 24, 1944 denying the prayer of a complaint which was filed in said Court in the above-entitled proceeding by the above-named plaintiffs under Part II of the Interstate Commerce Act and particularly under Section 207 of the said Act (49 U. S. Code 307) and pursuant to the provisions of Section 41(28) and Sections 43 to 48, inclusive, of Title 28 of the United States Code as applied and extended by Section 305(9) of Title 49 of the said Code.

Said complaint prayed that said District Court set aside and annul an order of the Interstate Commerce Commission entered November 2, 1943 in proceedings entitled *Southeastern Motor Lines, Inc.*, Common Carrier Application, No. MC-76037 insofar as said order and its accompanying report found that public convenience and necessity required operation by Associated Transport, Inc., as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, with exceptions, between Nashville and Knoxville, Tennessee, over regular routes. The complaint filed in the above-named District Court alleged, among other things, that the Commission's said order was erroneous in law, and that the applicant was not entitled to a certificate as prayed in its application upon the evidence presented to the commission, and that by reason of the said order of the Commission approving the said application the plaintiffs would suffer great and irreparable damage to their business.

The case came on for final hearing before a Court of three judges pursuant to the provisions of U. S. C. Title 28, Section 47 (Act of October 22, 1913, C. 32, 38 Stat. 220). A transcript of all the evidence received before the Interstate Commerce Commission, duly certified by the Secretary of the Commission, was received in evidence before the said Court. On August 24, 1944 the Court rendered its opinion holding that the prayer of the complaint should

be denied and made its findings of fact and conclusions of law, and entered the final decree sought to be reviewed.

The questions involved by this appeal are substantial in that the case involves the duties and powers of the Interstate Commerce Commission with respect to the issuance of certificates of public convenience and necessity to common carriers under Section 207 of the Interstate Commerce Act authorizing new service or extension of operations upon a showing of illegal service under the so-called "grandfather" clause of Section 206(a) of the Interstate Commerce Act. They also involve the duties and powers of the Interstate Commerce Commission in authorizing the issuance of certificates of public convenience and necessity to common carriers by motor vehicle authorizing competitive operations with existing common carriers by motor vehicle without a finding that the service of existing carriers is inadequate to satisfactorily perform the proposed service.

The questions presented by this appeal further involve the power of the Interstate Commerce Commission to assign an application involving an operation proposed to be conducted in not more than three states to an Examiner for appropriate proceedings rather than to a Joint Board as specified in Section 205(a) of the Interstate Commerce Act.

4. The cases sustaining the jurisdiction of the Supreme Court of the United States to entertain this appeal are:

Ziffrin, Inc. v. *United States,* 318 U. S. 73; 63 S. Ct. 465; 87 L. Ed. 621.

Howard Hall Co. v. *United States,* 315 U. S. 495; 62 S. Ct. 732; 86 L. Ed. 986.

United States v. *Carolina Freight Carriers Corp.,* 315 U. S. 475; 62 S. Ct. 722; 86 L. Ed. 971.

Loving v. *United States,* 310 U. S. 609; 60 S. Ct. 898; 84 L. Ed. 1387.

United States v. *Maher*, 307 U. S. 148; 59 S. Ct. 768; 83 L. Ed. 1162.

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454; 55 S. Ct. 268; 79 L. Ed. 587.

Beaumont, Sour Lake & Western Ry. Co. v. *United States*, 282 U. S. 74; 51 S. Ct. 1; 75 L. Ed. 221.

Ann Arbor Railroad Co. v. *United States*, 281 U. S. 658; 50 S. Ct. 444; 74 L. Ed. 1098.

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1; 35 S. Ct. 602; 59 L. Ed. 1502.

5. The plaintiffs append hereto as Exhibit A a copy of the opinion of the District Court and a copy of the decree of said Court sought to be reviewed.

WHEREFORE, it is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal.

Dated October 23, 1944.

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EXHIBIT A

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

Civ. No. 24-170

ANDREW B. CRICHTON, ET AL., *Plaintiffs,*

vs.

UNITED STATES OF AMERICA, ET AL., *Defendants*

Opinion

Filed Aug. 25, 1944

Before CLARK, *Circuit Judge,* and COXE and CONGER, *District Judges.*

Action by Andrew B. Crichton, R. M. Crichton, C. N. Crichton, M. E. Crichton, R. B. Crichton, and A. B. Crichton, Jr., copartners doing business as Super Service Motor Freight Company, The Mason and Dixon Lines, Inc., and Hoover Motor Express Company, Inc., against the United States of America and the Interstate Commerce Commission to set aside a commission order granting a certificate of public convenience and necessity as a motor carrier of property to Associated Transport, Inc., wherein the latter company and Southeastern Motor Lines, Inc., have intervened as defendants. Judgment for the defendants, dismissing the action.

Edgar Turlington, of Washington, D. C. (Neilson Olcott and Olcott, Havens, Wandless & Stitt, all of New York City, and James E. Wilson and Roberts & McInnis, all of Washington, D. C., on the brief), for plaintiffs.

Edward Dumbauld, Sp. Asst. to Atty. Gen., of Washington, D. C., (James B. M. McNally, U. S. Atty., and William L. Lynch, Asst. U. S. Atty., both of New York City, and Wendell Berge, Asst. Atty. Gen., and Robert L. Pierce, Sp. Asst. to Atty. Gen., both of Washington, D. C., on the brief), for defendant United States.

Edward M. Reidy, Asst. Chief Counsel, Interstate Commerce Commission, of Washington, D. C., (Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, of Washington, D. C., on the brief), for defendant Interstate Commerce Commission.

Mortimer Allen Sullivan, of Buffalo, N. Y., for Intervening Defendants Associated Transport, Inc., and Southeastern Motor Lines, Inc.

CLARK, *Circuit Judge:*

Plaintiffs, as competitors of Associated Transport, Inc., a motor truck line, bring this action under 28 U. S. C. A., secs. 41(28), 43-48, and 49 U. S. C. A. sec. 305(g), to set aside an order of the Interstate Commerce Commission, dated November 2, 1943, which granted Associated the certificate of public convenience and necessity required by Part II of the Interstate Commerce Act, formerly the Motor Carrier Act, 1935, secs. 206(a), 207(a), 49 U. S. C. A. secs. 306(a), 307(a), to enable it to act as a common carrier of property by motor vehicle in interstate commerce over regular routes between Nashville and Knoxville, Tennessee. Associated is the eventual successor in interest to three brothers Jacobs, copartners doing business as Jacobs Motor Service, who in January, 1935, applied to the Railroad and Public Utilities Commission of Tennessee for a permit to operate as a common carrier by motor vehicle in interstate commerce between Nashville and the Tennessee-Virginia state line at Bristol, Tennessee. Although the Tennessee Commission denied this application on March 27, 1935, the Jacobs nevertheless commenced trucking operations between Nashville and New York City in April of the same year. In June, 1935, one of the brothers was arrested for lack of a Tennessee permit; but the state commission reconsidered its previous decision by granting the requested permit in July, 1935, and service to New York hence continued. On February 11, 1936, the Jacobs made application to the Interstate Commerce Commission under the "grandfather" clause of section 206(a) of the then new Motor Carrier Act, 1935,

for a certificate of public convenience and necessity as a common carrier by motor vehicle between Nashville and New York City. They made no trips after February 17, 1936, however, and the following month sold all their operating rights to Hoover Lines, Inc.

Although Hoover requested and received from the Tennessee Commission in March, 1936, approval of its purchase of the Jacobs' state operating rights, it delayed in making application to the I. C. C., for approval of the purchase, as required by section 213 of the Act, until June, 1936. Meanwhile no operations took place over the line. On June 11, 1937, the I. C. C., approved the purchase, but noted in its report that Hoover had upon oral argument abandoned any claim to the Jacobs' "grandfather" rights between Knoxville and New York because of other pending applications covering that much of the route. *Hoover Lines, Inc.—Purchase—Jacobs,* 5 M. C. C. 97. Shortly thereafter, Hoover recommenced operations. On December 2, 1937, the I. C. C., in consideration of Hoover's previous abandonment of any claims from Knoxville to New York, restricted the original Jacobs "grandfather" application to operations between Nashville and Knoxville, and, pursuant to the mandate of section 205(a) of the Act regarding applications which involve operations in "not more than three States," referred the thus delimited application for hearing before a joint board.

Early in 1938, Hoover became bankrupt and sold its operating rights to Southeastern Motor Lines, Inc., which appeared at the hearing on the "grandfather" application before Joint Board 107 in Nashville in May, 1938. On June 29, 1938, the Joint Board recommended denial of the application. Then on July 16, 1938, Southeastern applied [1] to the I. C. C., for a certificate of public convenience and necessity as a common carrier between Nashville and New York under section 207(a) of the Act. Two months later, the Commission set aside its order of December 2, 1937, which restricted the original "grandfather" application to operations between Nashville and Knoxville, and

[1] Making, in form, two applications with two docket numbers, Cf. 43 M. C. C. 37, which are treated herein as a unit.

set down for hearing before an examiner in Nashville the two applications, under the "grandfather" clause and under section 207(a), for operating rights between Nashville and New York. At this hearing Southeastern, in addition to portraying the background set forth above, showed that it was the owner of some forty vehicles, and that it operated an extensive daily service of from one to three tractor-trailer units between Nashville and New York. Southeastern's shipping lists bore witness to the volume and scope of this service, while numerous satisfied shippers testified to its efficiency and expressed the opinion that there was a definite need that it be continued. Other carriers introduced similar evidence as to their respective services, and it appeared that there were a number of substantial motor carriers offering trucking accom-odations between Nashville and New York very similar to Southeastern's.

After considering the evidence for almost a year, the trial examiner denied both of Southeastern's applications by report and order of March 12, 1940. While review of this decision was pending before Division V of the I. C. C. early in 1942, the full Commission approved the acquisition by Associated of control over Southeastern and other carriers, *Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137, a statutory district court refused to interfere, *McLean Trucking Co.* v. *United States*, D. C. S. D. N. Y., 48 F. Supp. 933, and the Supreme Court affirmed in a lengthy opinion, 321 U. S. 67, 71, which pointed out, inter alia, that as a result of the merger Associated "will be the largest single motor carrier in the United States." Hence Associated was substituted for Southeastern as applicant. Division V affirmed the holding of the examiner on December 30, 1942, one commissioner dissenting. 41 M. C. C. 671. Upon application for reconsideration, the full Commission on November 2, 1943, with four commissioners dissenting, reversed this determination in part and granted the section 207(a) application in so far as it related to operations between Nashville and Knoxville. 43 M. C. C. 37. The denial of the "grandfather" application remained undisturbed, since the Commission

deemed the cessation of operations by the Jacobs and Hoover between February, 1936, and July, 1937, not to have been an interruption of service "over which the applicant or its predecessor in interest had no control" within the meaning of the statute; while the section 207(a) application was granted only as to operations between Nashville and Knoxville because Southeastern had already received permission in a separate proceeding for operations between Knoxville and New York. It is against this order that the plaintiffs bring the present action. Associated and Southeastern have joined as intervening defendants with the permission of the court.

Section 206(a) of the present Part II of the Interstate Commerce Act provides that "no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations." Then follows the so-called "grandfather" clause or proviso which requires the Commission to issue a certificate upon no further showing than that the applicant was "in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control," provided application was made to the Commission for a certificate within 120 days after October 1, 1935.

Section 207(a) orders the issuance of a certificate of public convenience and necessity "to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and

necessity." Section 205 meanwhile prescribes the administrative procedure to be followed by the Commission. By the terms of section 205(a), "The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this chapter with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, * * *." Section 205(b) prescribes that joint boards shall generally be composed of one member from each state involved.

Plaintiffs urge at the outset that the order of the Commission is void, since the section 207(a) application involved operations in "not more than three States," and hence that reference for hearing before a joint board, rather than an examiner, was mandatory under section 205(a). But the original application of July 16, 1938, covered operations between Nashville and New York, well in excess of three states; and in the absence of direct evidence of fraud or deception, the Commission should not be obliged to go beyond the face of the application in determining whether or not reference to a joint board is mandatory. Any other rule would be the source of endless confusion and needless circuity of action. See *West Coast Bus Lines, Ltd., Common Carrier Application*, 32 M. C. C. 619, 621-622, approved as to this issue by the full Commission, 41 M. C. C. 269, 270, and thereafter by a statutory court in *North Coast Transportation Co.* v. *United States*, D. C. N. D. Cal., 54 F. Supp. 448, 450-451.

Turning to the merits, objection is futile that the Commission erred in taking past operations into consideration in determining the present or future public convenience and necessity of the applicant's operations. The Commission has held, in persuasive opinion, that, where past operations have been conducted under color of "grandfather" rights, openly and without subterfuge, as was surely the

case here, they are competent evidence on the issue of public convenience and necessity. *D. A. Beard Truck Lines Co., Common Carrier Application—New Operation,* 34 M. C. C. 395; *Hoover Motor Express Co., Inc., Extension of Operations—Intermediate Points,* 42 M. C. C. 315, 332; *Fisher Common Carrier Application—New Operation,* 42 M. C. C. 695, 696, 697; *Trans-American Van Service, Inc., Common Carrier Application;* No. MC-22254, decided January 22, 1944, 43 M. C. C. ——. And since the issue under this section is not as to "grandfather rights," but as to public demand or need, or how much the applicant's service is required and used by the public, it is not a bar to admissibility of such evidence that the past operations may have been conducted in violation of state law, as the operations from April to June, 1935, by the brothers Jacobs very likely were. *Ibid.* Certainly with this evidence the Commission's finding of public convenience and necessity was amply justified by the evidence; and the Commission, of course, with its expert judgment in this field, is the trier of facts. *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156, 158; *Merchants' Warehouse Co.* v. *United States,* 283 U. S. 501, 508; *Alton R. Co.* v. *United States,* 315 U. S. 15, 23; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 482. As the Commission stated in *Dougherty Storage & Van Co. Common Carrier Application,* 3 M. C. C. 427, 432, "Successful operation in the past creates a presumption that public convenience and necessity require a continuance of such operation." See also *Black & White Express Contract Carrier Application,* 6 M. C. C. 633, 634.

Although the Commission found that Associated was "fit, willing, and able properly to perform the service proposed," as required by section 207(a), there was no evidence regarding the matter in the record. Instead, the Commission supported its finding by reference to the recent thorough investigation of Associated which it had conducted during the 1942 control and consolidation proceeding. *Associated Transport, Inc.—Control and Consolidation, supra.* This was the identical procedure followed by the Commission in its earlier decision in *Hoover Motor Express Co., Inc. Extension of Operations—Intermediate Points, supra,* 42 M. C. C., at page 317. Plaintiffs here were parties to the

consolidation proceeding; and the course followed was proper and expedient. We have lately upheld the power of a court to take judicial notice of its own records, *Nahtel Corp.* v. *West Virginia Pulp & Paper Co.*, 2 Cir., 141 F. 2d 1; *Goldstein* v. *Groesbeck*, 2 Cir., 142 F. 2d 422, citing *National Fire Ins. Co. of Hartford* v. *Thompson*, 281 U. S. 331, which collects the Supreme Court cases; and the Commission is an administrative body not limited by as strict rules of evidence as control the courts. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93. Further, the intelligent functioning of the administrative process demands that the Commission be not required to indulge in lengthy evidentiary recapitulations of matters just decided in a companion case.

The case was submitted on a full record of all proceedings before the Commission and upon the stipulation of all parties that final judgment should be rendered. It follows from what we have said that the action must be dismissed on the merits with costs. Defendants have asked us to sign purely formal findings of fact. Since it is the Commission's duty, not ours, to find the facts, this seems at least superfluous, *Public Service Commission of State of New York* v. *United States*, D. C. S. D. N. Y., July 17, 1944. — F. Supp. ——; but to avoid all doubt, we state that we accept and adopt the Commission's findings of facts, approve its conclusions of law, and decide that its order was made as to matters within its jurisdiction and authority and with the support of substantial evidence, and that it is valid and lawful. A final decree to that effect is being filed with this opinion.

CHARLES E. CLARK,
U. S. Circuit Judge.
ALFRED A. COXE,
U. S. District Judge.
EDWARD A. CONGER,
U. S. District Judge.